

Before the  
**Federal Communications Commission**  
Washington DC 20554

In the Matter of	)	
	)	
i2way Request for Declaratory Ruling	)	
Regarding the Ten-Channel Limit	)	WT Docket No. 02-196
of Section 90.187(e) of the Commission's	)	
Rules	)	
	)	
Hexagram Petition to Deny i2way	)	
Applications	)	

TO: The Commission

**APPLICATION FOR REVIEW  
OF HEXAGRAM, INC.**

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**APPLICATION FOR REVIEW  
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Pursuant to Section 1.115 of the Commission's Rules, Hexagram, Inc. submits this Application for Review of the Wireless Telecommunication Bureau's Order in WT Docket No. 02-196.<sup>1</sup>

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<sup>1</sup> *i2way Request for Declaratory Ruling*, in WT Docket No. 02-196, Order, DA 03-1044 (Wireless Telecom. Bur. released April 1, 2003). Hexagram seeks review of the dismissal of a Petition to Deny captioned with the following applications, and extends this Application for Review and the requests herein to any other applications that are similarly situated: Application File Nos. 0000361676, 0000361718, 0000362074, 0000362081, 0000362240, 0000362263, 0000362850, 0000362873, 0000363194, 0000363233, 0000363326, 0000363415, 0000365157, 0000365955, 0000366047, 0000366335, 0000366750, 0000367416, 0000367445, 0000367533, 0000367563, 0000367564, 0000367653, 0000367744, 0000367828, 0000367900, 0000367918, 0000368539, 0000368557, 0000368659, 0000368665, 0000368737, 0000368821, 0000368990, 0000368991, 0000369064, 0000369149, 0000369255, 0000369265, 0000369318, 0000369369, 0000369770, 0000369981, 0000369993, 0000370164, 0000370209, 0000370230, 0000370267, 0000370899, 0000372203, 0000372294, 0000372385, 0000372669, 0000373428, 0000373528, 0000376863, 0000400857, 0000402494, 0000420028, 0000421288, 0000432405, 0000485712, 0000544363, 0000544366, 0000544401, 0000545589, and 0000609619.

## **I. SUMMARY**

### **Background**

Hexagram, Inc. makes and operates radios for automatic reading of utility meters. This technology reduces utility costs and promotes conservation of energy. Hexagram systems typically operate tens of thousands of transmitters on the same frequency. Each transmitter sends a brief (typically under 1/10 second) burst of data a few times a day.

i2way Corporation filed multiple applications for radios that scan over multiple frequencies, looking for vacant channels, so as to move communications continually from one momentarily vacant channel to another. The system is claimed to detect and avoid all occupied frequencies. i2way sought relief from frequency coordination, which is otherwise required under the Rules, and in exchange assured the Commission that its system would fully protect all co-channel users, regardless of their technologies.

***Pleadings.*** Hexagram filed a Petition to Deny. It asked the Commission to establish that i2way's system can detect and avoid brief transmissions, such as Hexagram's, before granting the applications. It asked for no other relief.

i2way opposed the Petition, arguing it had no obligation to protect a secondary user such as Hexagram.

Hexagram replied that i2way had offered to protect all users, not just primary users, instead of submitting to frequency coordination. In effect, i2way asked to perform its own frequency coordination on the fly. Secondary users such as Hexagram, which rely on conventional frequency coordination, stand to be harmed if i2way were to bypass frequency coordination and then fail to detect Hexagram's transmissions.

**Bureau Order.** The Bureau rejected Hexagram's Petition to Deny as untimely, for failure to make a *prima facie* showing, and for requesting relief that is "not relevant."

### **This Application for Review**

**Timeliness.** Hexagram's Petition was not untimely, because the document giving public notice of the applications omitted any actual notice of the element challenged in the Petition: namely, i2way's request to substitute its own technology for frequency coordination. The case law requires the Commission to accept pleadings that are out of time solely because the pleading party did not have actual notice of the action at issue. Separately, the relevant filing period is set by Rule, not statute, and is within the Commission's discretion to waive.

**Prima facie showing.** A Petition to Deny must make a *prima facie* showing that the petitioner is a party in interest, and that a grant of the contested application would be contrary to the public interest. The Bureau dismissed because Hexagram had not specifically identified which i2way applications would infringe on which Hexagram licenses. But Hexagram correctly characterized itself (along with its customers) as a nationwide user of the UHF 12.5 kHz offset frequencies, after i2way had likewise described its systems as nationwide in applications that seek to blanket the same set of frequencies. That juxtaposition establishes Hexagram as a *prima facie* party in interest to i2way's applications. And a grant of i2way's applications -- if indeed its system fails to detect other transmissions and thereby causes unanticipated interference -- is *prima facie* contrary to the public interest.

**Enforcement of i2way's representations.** The Bureau declined to enforce i2way's commitments to prevent interference, stating that the Commission's Rules already require protection against interference. But i2way seeks to avoid an essential component of those rules

(on frequency coordination). The Bureau's ruling thus leaves Hexagram with neither the benefit of i2way's assurances, nor the protection Hexagram would enjoy under a full application of the Rules.

***Request for relief.*** Hexagram asks the Commission *either* (1) to require i2way to deliver the protection it offered to all co-channel users, including Hexagram and its customers, *or* (2) to hold i2way to all of the same rules as any ordinary licensee, including (among others) the requirement for frequency coordination.

## **II. INTRODUCTORY MATTER**

### **A. Questions presented:**

1. Whether a Petition to Deny an application can be dismissed as untimely because it is filed more than 30 days after release of a public notice that fails to give actual notice of the novel issues contested in the Petition to Deny.
2. Whether an applicant offering to substitute a novel interference-preventing technology in lieu of required frequency coordination should be held to its representation that its technology actually prevents interference.
3. Whether the Bureau can rationally excuse an applicant from its commitment to protect co-channel users on the ground that the Commission's Rules provide such protection, where a grant of the application would nullify a key element of those Rules.

### **B. Factors Warranting Commission Consideration of the Questions Presented<sup>2</sup>**

- The Order entails prejudicial procedural error.
- The Order embodies an erroneous finding as to an important or material question of fact.

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<sup>2</sup> See 47 C.F.R. Sec. 1.115(b)(2).

- The Order involves a question of law or policy which has not previously been resolved by the Commission.

### III. BACKGROUND

Hexagram is one of the oldest vendors of automatic meter reading systems in the country. Among over two million devices for collection and reporting of utility meters throughout the nation, in both residences and businesses, Hexagram has deployed nearly 500,000 devices employing fixed RF networks under more than 300 licenses issued to Hexagram and its customers. These are Part 90 transmitters currently operating under the low power rules on 12.5 kHz offset frequencies in the UHF band.

Each Hexagram transmitter emits a short data burst, typically less than 1/10 second, two to four times each day. Despite their short duty cycle, these devices achieve a very high spectrum efficiency, due to the large number of transmitters deployed. A large system might total 10,000 transmissions per hour, spread over 75 receiver cells. Hexagram's brief data bursts are inaudible to a co-channel voice user.<sup>3</sup>

i2way Corporation filed several dozen applications, each seeking to license scores of 12.5 kHz offset UHF frequencies.<sup>4</sup> The Commission's Rules require frequency coordination on those

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<sup>3</sup> Hexagram has never received a report of interference. Its transmissions are difficult to detect, even by someone deliberately listening for them on an otherwise clear channel. Research shows that a listener can comprehend speech even if a 100 msec pulse, such as that produced by the Hexagram system, were to occur as often as every 200 msec -- many times the typical rate for a Hexagram cell. See Miller G.A., and Licklider J.C.R. (1950), *The Intelligibility of Interrupted Speech*, Journal of the Acoustic Society of America. 22(2), 1950, 167-173.

<sup>4</sup> For example, Application File No. 0000361718, which is typical, lists 115 channels. See note 1 for a list of application file numbers.

channels.<sup>5</sup> But i2way objected that "[c]oordination of these frequencies by the authorized frequency coordinators has been difficult in the past . . . ."<sup>6</sup> In seeking to be excused from frequency coordination, i2way claimed that its system, when initiating a two-way communication, will "automatically bypass any frequencies then in use by other systems."<sup>7</sup> i2way asserted its system scans licensed frequencies at the rate of 100 channels per second and

assigns traffic to channel pairs that have been unused for a specified period of time, which is typically 15 seconds but may vary depending on channel loading. Channels assigned for traffic use are vacated after a time dependent upon activity, usually 30 to 60 seconds. The channel is then rotated out of use for a time to allow co-channel users the opportunity to conduct their traffic.<sup>8</sup>

In other words, i2way asked to do its own frequency coordination on the fly.

i2way promised its technology would protect "all co-channel users, whether employing modern digital systems or legacy analog equipment."<sup>9</sup>

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<sup>5</sup> 47 C.F.R. Sec. 90.129 ("Each application under this part [90] that is received by the Commission . . . must be accompanied by the applicable information listed below: (a) Evidence of frequency coordination as required by Sec. 90.175. . . ."); 47 C.F.R. Sec. 90.175 ("Except for applications listed in paragraph (j) of this section, each application for a new frequency assignment . . . must include a showing of frequency coordination as set forth further.") None of the exceptions in paragraph (j) applies to i2way's applications.

<sup>6</sup> *Statement Detailing A New Technique for the Deployment of Low-Power Frequencies in the 450-470 MHz Band* at 1, attached to Letter from Frederick J. Day, Counsel for i2way Corporation, to FCC (dated June 5, 2001) (hereinafter "i2way Statement").

<sup>7</sup> *Note Regarding the Requirement for Access to the Full Panoply of Low-Power Frequencies* at para. B, attached to Application File Nos. 0000361676 *et al.* (filed Dec. 10, 2001) (hereinafter, i2way Note).

<sup>8</sup> i2way Statement at 1.

<sup>9</sup> i2way Statement at 2.



Hexagram filed a Petition to Deny on one issue: Hexagram expressed concern that i2way's monitoring system might either fail to detect Hexagram's extremely short transmissions, or else misclassify them as noise.<sup>10</sup> Hexagram explained: If the i2way system mischaracterizes a Hexagram-occupied channel as being vacant, despite thousands of active transmitters, it might consistently choose the Hexagram channels for operation over those occupied by more conventional voice or data communications. The result would be near-continuous interference to Hexagram's customers. Hexagram therefore asked the Commission not to permit the i2way applications to go forward until i2way has shown it can protect all incumbent users, including Hexagram.<sup>11</sup> That was Hexagram's sole request for relief.<sup>12</sup>

i2way's Opposition to Hexagram's Petition delivered a barrage of irrelevant accusations, all of them demonstrably untrue.<sup>13</sup> i2way's sole substantive response was an apparent concession that its "pre-qualifying" receiver -- the scanning system described above -- may be inadequate on

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<sup>10</sup> Petition to Deny of Hexagram, Inc. (filed Feb. 28, 2002).

<sup>11</sup> Hexagram Petition to Deny at 4.

<sup>12</sup> Other parties objected to i2way's multi-channel applications under the 10-channel limit in Section 90.187(e), which became the central issue in WT Docket No. 02-196. *See Wireless Telecommunications Bureau Seeks Comment on I2way Corporation's Request for Declaratory Ruling Regarding the Ten-channel Limit of Section 90.187(e)*, WT Docket No. 02-196, Public Notice, DA 02-1827 (released July 29, 2002).

<sup>13</sup> i2way alleged that Hexagram lacks standing; Hexagram is not entitled to protection; Hexagram is improperly licensed; Hexagram must employ automatic monitoring; Hexagram has tried to give itself an unfair competitive advantage; Hexagram will create massive interference on land mobile frequencies; Hexagram is a threat to homeland security; the Commission should cancel all of Hexagram's licenses; Hexagram has filed a disingenuous Petition to Deny; and Hexagram has caused i2way unnecessary expense, costs, and delay that it can never hope to recover. Opposition of i2way Corporation at 2-8 (filed April 1, 2002).

its own to detect occupied channels.<sup>14</sup> i2way added (for the first time) that a transceiver assigned to the channel will separately monitor the channel before transmitting.<sup>15</sup>

But i2way still omitted key data. How long will the transceiver monitor the channel before it transmits?<sup>16</sup> What is the shortest transmission the transceiver will detect to identify the channel as occupied? How will the system distinguish short transmissions, such as Hexagram's, from noise? How long will the system consider the channel occupied before it checks the channel again? If i2way occupies and releases the channel, how long will it leave the channel alone before polling it again for possible re-occupancy?<sup>17</sup>

Each of these questions is critical to determining whether in fact i2way's system can adequately avoid Hexagram's transmissions. In failing to provide this information, i2way failed to show how it intends to honor its commitment of avoiding interference to other users.

Hexagram's Reply explained these points and reiterated the request that the Commission not permit the subject applications to go forward until i2way has shown it can and will protect all other users, including Hexagram.<sup>18</sup>

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<sup>14</sup> i2way Opposition at 8-9.

<sup>15</sup> i2way Opposition at 8-9.

<sup>16</sup> i2way says it will "typically" wait until the channel has been vacant for 15 seconds, but adds, without further quantification, that this period may "vary depending on channel loading." i2way *Statement* at 1.

<sup>17</sup> After use, the channel is rotated out of use "for a time to allow co-channel users the opportunity to conduct their traffic." i2way *Statement* at 1. But i2way does not say for how long.

<sup>18</sup> Reply of Hexagram, Inc. to Opposition of i2way Corporation (filed April 11, 2002).

The Bureau responded by dismissing Hexagram's Petition as untimely, rejecting the Petition for failure to make a *prima facie* showing, and denying the relief requested as "not relevant."<sup>19</sup>

This Application for Review challenges the Bureau Order.

#### **IV. THE BUREAU IMPROPERLY DISMISSED HEXAGRAM'S PETITION AS UNTIMELY.**

Hexagram filed its Petition to Deny more than 30 days after public notice of the subject applications. Hexagram's Motion for Late Acceptance explained that the public notice did not give *actual* notice, or even a hint of actual notice, of i2way's request to substitute its own technology for the required frequency coordination -- the sole issue raised in Hexagram's Petition.<sup>20</sup> The public notice shows locations and frequencies, but not i2way's proposal to adopt a novel technology in lieu of frequency coordination. Hexagram learned the extraordinary contents of i2way's applications only inadvertently, and only when the 30-day filing period had passed.

After Hexagram filed its Petition and properly served i2way, i2way requested and received Hexagram's consent to filing i2way's Opposition out of time. In a breathtaking display

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<sup>19</sup> Order at paras. 12-14.

<sup>20</sup> This is a typical public notice entry:

0000361676	i2way CORPORATION	HOUSTON	TX	AM
07/20/2001	00451.18750	29-45-26.0 N	095-21-37.0 W	P

. . . and so on, for over 200 entries under the same file number. No other information is provided. *Wireless Telecommunications Bureau, Site-By-Site Accepted for Filing*, Report Number 926 (released Aug. 1, 2001).

of *chutzpah*, i2way used its own late filing to seek the dismissal of Hexagram's filing as late!<sup>21</sup>

Apparently missing the irony, the Bureau indeed dismissed Hexagram's petition as out of time.<sup>22</sup>

That dismissal is incorrect on its face.

The Bureau states,

Hexagram does not provide any explanation for filing its Petition six weeks late. We therefore deny Hexagram's request because it provides no basis on which to grant the request.<sup>23</sup>

Yet, in a footnote to that same passage, the Bureau correctly recites Hexagram's ground for the delay -- namely, a complete lack of actual notice. The Bureau cannot resolve a facially valid argument simply by ignoring it.<sup>24</sup>

The U.S. Court of Appeals requires the Commission to accept pleadings that, like Hexagram's Petition, are untimely solely because the pleading party did not have actual notice of the action at issue.<sup>25</sup> Unlike the cases cited, moreover, the filing deadline for a Petition to Deny is set by Commission rule, not a statute.<sup>26</sup> That puts acceptance of a late Petition squarely within

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<sup>21</sup> i2way Opposition at 2.

<sup>22</sup> Order at para. 12.

<sup>23</sup> Order at para. 12 (footnote omitted).

<sup>24</sup> Hexagram actually made two arguments, plainly labeled in the alternative: that its Petition was not late, due to the lack of actual notice; and that the Commission should accept the Petition out of time. Both rested on the same ground: that Hexagram was denied actual notice of the contested element in the i2way applications. Hexagram Petition to Deny at 1-2.

<sup>25</sup> *Gardner v. FCC*, 530 F.2d 1086, 1091-92 (D.C. Cir. 1976) (reconciling 30-day limit in statute with "general concern for procedural fairness"). *Accord*, *Roy M. Speer*, 16 FCC Rcd 3993 at para. 11 (1999); *Dorothy D. Park*, 11 FCC Rcd 3450 at para. 1 n.1 (1996).

<sup>26</sup> *See* 47 U.S.C. Sec. 309(d)(1) (authorizing Commission to specify filing period for petition to deny an application).

the Commission's discretion. Finally, considering the lapse of time between the filings and the Bureau's Order, no one can seriously claim that accepting Hexagram's Petition would have prejudiced any party.

For each of these reasons, Hexagram asks the Commission to reinstate the Petition to Deny and related pleadings, and to fully consider the facts and arguments they present.

**V. THE BUREAU IMPROPERLY REJECTED HEXAGRAM'S REQUEST TO HOLD I2WAY TO ITS REPRESENTATIONS.**

i2way told the Commission its system will "automatically bypass any frequencies then in use by other systems" when initiating a two-way communication.<sup>27</sup> It added that the i2way "is premised on providing a high degree of 'deference' to the communications of other users."<sup>28</sup>

And more: The i2way system "was specifically designed to be 'invisible' to other low-power operations."<sup>29</sup> "All co-channel users, whether employing modern digital systems or legacy analog equipment, are protected by this automatic system."<sup>30</sup> i2way's equipment "will render i2way's transmissions imperceptible to other users."<sup>31</sup> i2way "willingly accepts" placing the burden of avoiding interference "entirely on i2way's system."<sup>32</sup>

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<sup>27</sup> i2way *Note* at para. B.

<sup>28</sup> i2way *Note* at para. B.

<sup>29</sup> Letter from Frederick J. Day, Counsel for i2way Corporation, to Federal Communications Commission at 1 (dated June 5, 2001) ("i2way *Day Letter*").

<sup>30</sup> i2way *Statement* at 2.

<sup>31</sup> i2way *Day Letter* at 1.

<sup>32</sup> i2way *Day Letter* at 1.

These are not casual remarks. They are representations integral to signed applications, and as such are binding on the applicant. Indeed, i2way made these statements with the intent of persuading the Commission to grant applications that otherwise fail to comply with the Rules for lack of frequency coordination.<sup>33</sup>

As a potential interference victim of i2way's operations, Hexagram is a supposed beneficiary of i2way's assurances. Hexagram has every right to ask the Commission to hold i2way to those assurances.

#### **A. i2way's Position**

i2way insists its assurances do not apply to Hexagram (1) because Hexagram is in chronic violation of the Rules [says i2way] for failure to monitor its channel before transmitting,<sup>34</sup> and (2) because Hexagram's data transmissions are secondary to i2way's voice usage.<sup>35</sup>

#### **B. Hexagram's Response**

i2way's first point is simply wrong. No rule requires Hexagram to monitor its channel before transmitting. i2way cites Section 90.173(b),<sup>36</sup> which has no such requirement.<sup>37</sup> To be

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<sup>33</sup> i2way makes this *quid pro quo* explicit. It says: "Given this characteristic [of being ""invisible" to other low-power operations'], i2way's use of the low-power frequencies is not a factor that will have to be considered when either the frequency coordinators or the Commission considers proposals for other low-power systems in neighboring areas. In other words, frequency coordinators will be able to simply coordinate (and the FCC can, in turn, license) neighboring systems as if the i2way systems were nonexistent." i2way *Day Letter* at 1.

<sup>34</sup> i2way Opposition at 8.

<sup>35</sup> i2way Opposition at 3-4.

<sup>36</sup> i2way Opposition at 4-5, 6, 9, 12, 13, 15.

<sup>37</sup> Section 90.173(b) in its entirety reads as follows:

sure, a secondary user must avoid causing harmful interference to a primary user,<sup>38</sup> but nothing in the Rules requires that to be accomplished by prior monitoring.<sup>39</sup>

The answer to i2way's second point -- that it can ignore Hexagram as a secondary user -- lies in i2way's own submissions. i2way's statements (quoted above on page 11) do *not* promise to protect only co-primary users, or other voice users, or any other subset of licensees. Those passages flatly state i2way will protect *all* other users. As noted, that is i2way's inducement in exchange for operating without conventional frequency coordination.<sup>40</sup>

Secondary users like Hexagram rely on frequency coordination, perhaps even more than primary users do. Hexagram does not cause interference to a primary voice user, as explained

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All applicants and licensees shall cooperate in the selection and use of frequencies in order to reduce interference and make the most effective use of the authorized facilities. Licensees of stations suffering or causing harmful interference are expected to cooperate and resolve this problem by mutually satisfactory arrangements. If the licensees are unable to do so, the Commission may impose restrictions including specifying the transmitter power, antenna height, or area or hours of operation of the stations concerned. Further the use of any frequency at a given geographical location may be denied when, in the judgment of the Commission, its use in that location is not in the public interest; the use of any frequency may be restricted as to specified geographical areas, maximum power, or such other operating conditions, contained in this part or in the station authorization.

47 C.F.R. Sec. 90.173(b).

<sup>38</sup> See 47 C.F.R. Sec. 90.7 (definition of "secondary operation").

<sup>39</sup> The Bureau rejected i2way's argument on procedural grounds, as being outside the scope of the proceeding. Order at para. 14.

<sup>40</sup> See note 33.

above.<sup>41</sup> But Hexagram could be disabled by interference *from* a high-powered voice user that routinely makes long-duration, closely spaced transmissions. Hexagram's frequency coordinator chooses frequencies that minimize this risk. Indeed, that is the coordinators' job: to distribute different types of users among available frequencies in ways that minimize interference among them. i2way's usage-detecting technology *might* be an adequate substitute. We don't know, because i2way has not provided the information needed to evaluate the technology's effectiveness.

### **C. The Bureau's Ruling**

The Bureau rejected Hexagram's Petition on procedural grounds "for failure to provide allegations of fact sufficient to make a *prima facie* showing that grant of the applications would be inconsistent with the public interest."<sup>42</sup> The Bureau charged Hexagram with failing to match up i2way's applications against the licenses used by Hexagram and its customers.<sup>43</sup> And the Bureau found "Hexagram's general statements of facts insufficient to warrant further investigation."<sup>44</sup>

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<sup>41</sup> In any event, i2way expressly waived its right as a primary user to be free of incoming interference: "i2way readily agrees to give up any rights that it might otherwise claim to protection from interference caused by co-channel operations." i2way *Statement* at 2.

<sup>42</sup> Order at para. 13 (citation footnote to 47 C.F.R. Sec. 1.939(d) omitted).

<sup>43</sup> Order at para. 13.

<sup>44</sup> Order at para. 13.



On the substantive issues, the Bureau refused to enforce i2way's commitment not to interfere with co-channel operations. It termed that commitment "not relevant" in light of the Commission's technical rules governing required protection among co-channel licensees.<sup>45</sup>

**D. Hexagram's Argument on Application for Review**

**1. Procedural issues**

The Bureau rests its procedural dismissal on Section 1.939(d), which requires that a Petition to Deny

contain specific allegations of fact sufficient to make a *prima facie* showing that the petitioner is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity.<sup>46</sup>

This comprises requirements for allegations to establish "party in interest" and "public interest." Hexagram has met both.

Hexagram properly alleged it is a party in interest by stating (over an affidavit) that its own and its customers' operations are nationwide in the UHF 12.5 kHz offset channels.<sup>47</sup> That followed i2way's description of its system as nationwide, and its applications for scores of those same channels.<sup>48</sup> The Bureau objects that Hexagram does not exhaustively specify which of its and its customers' approximately 300 licenses are threatened by each of i2way's dozens of multi-

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<sup>45</sup> Order at para. 14.

<sup>46</sup> 47 C.F.R. Sec. 1.939(d).

<sup>47</sup> Hexagram Petition to Deny at 2.

<sup>48</sup> i2way *Statement* at 1; i2way *Note* at para. A (i2way system when fully deployed will operate "in virtually all major urban areas of the country").

channel applications.<sup>49</sup> But Section 1.939(d) requires only a *prima facie* showing. The juxtaposition of both parties' nationwide reach, together with i2way's efforts to blanket the same category of channels that Hexagram uses, put the cross-matched tabulation sought by the Bureau far beyond the mandate of the rule.<sup>50</sup>

On the public interest requirement, the Bureau accurately recites Hexagram's explanation of how i2way's transmitters might preferentially seize Hexagram's channels, and thereby cause excessive interference, all notwithstanding i2way's assurances of noninterference. If true, these allegations plainly render the applications inconsistent with the public interest.

In short, Hexagram's Petition fully met the requirements of Section 1.939(d). The Bureau's characterization of Hexagram's "general statements of facts" as "insufficient to warrant further investigation" would stretch the procedural rules so far as to deny substantial justice.

## **2. Substantive issues**

The Bureau rejected Hexagram's sole request for relief: that the Commission enforce i2way's own commitment to protect co-channel users from interference. The Bureau said:

[W]e also reject Hexagram's plea to enforce i2way's "promise" not to interfere with any other co-channel licensee's operations regardless of the technology used. A "promise," in this case, is not relevant because the Commission has technical rules that govern the protection required against harmful interference between co-channel licensees. We decline in this proceeding to provide protection beyond that afforded under the

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<sup>49</sup> Order at para. 13.

<sup>50</sup> The two companies' systems inevitably overlap. Two examples: In Washington DC, on both 451.3375 and 456.3375 MHz, Hexagram WPWH268 and i2way 0000361718 are centered 3 km apart within Hexagram's 33 km radius. In Des Moines IA, on 456.2875 MHz, Hexagram WPRU260 and i2way 0000369064 are centered 2 km apart within Hexagram's 42 km radius. Hexagram's customers have other such overlaps.

Commission's rules for secondary or co-primary operations in the 450-470 MHz bands.<sup>51</sup>

This is inexplicable. The Bureau declines to enforce i2way's commitments to prevent interference because, it says, the Commission's Rules will do the job. *Yet the i2way applications seek to nullify a key element of those rules!* The Bureau's decision leaves Hexagram the benefits of *neither* i2way's assurances *nor* frequency coordination.<sup>52</sup>

i2way made its extraordinary offer of co-channel protection because it knew its applications otherwise presented an unacceptable risk of interference. Now the Bureau has both approved the applications and shrugged off the co-channel protection. All that remains is the unacceptable risk. The Bureau's ruling is simply wrong.

## **VI. REQUEST FOR RELIEF**

In view of the foregoing, Hexagram asks the Commission to correct the Bureau's errors by *either* (1) requiring i2way to deliver the protection it offered to all co-channel users, *or* (2)

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<sup>51</sup> Order at para. 14 (footnotes omitted; quotation marks in original).

<sup>52</sup> In a "*see, e.g.*" citation, the Bureau lists some of the rules that protect co-channel users: 47 C.F.R. Secs. 90.7, 90.173(a) and (b), 90.403(e). Order at para. 14 n.43. The list unaccountably omits Sections 90.129 and 90.175, which require frequency coordination as an important measure toward mitigating interference.

holding i2way to all of the same rules as any ordinary licensee, including (among others) the requirement for frequency coordination and the ten-channel trunking limit.

Respectfully submitted,

Mitchell Lazarus  
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Counsel for Hexagram, Inc.

May 1, 2003

## **CERTIFICATE OF SERVICE**

I, Deborah N. Lunt, an employee of the firm of Fletcher, Heald & Hildreth, PLC, certify that this day of May 1, 2003, I have caused the foregoing "Application for Review of Hexagram, Inc." to be sent by first class mail, postage prepaid, to the persons named below, except that persons identified as affiliated with the Federal Communications Commission were instead served by hand delivery and by email.

Chairman Michael Powell  
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Commissioner Kathleen Q. Abernathy  
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Commissioner Michael J. Copps  
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Commissioner Kevin J. Martin  
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Paul D'Ari, Chief  
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The Honorable Pete Domenici  
United States Senate  
Washington, DC 20510-3101

John L. Jones  
Entranosa Water & Wastewater Association  
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The Honorable Jeff Bingaman  
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